Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

IN RE: ESTATE OF LILLIAN E. WOHLPART, A/K/A LILLIAN WOHLPART, DECEASED

PETITION OF: CHERYL A. FUREY, ESQUIRE, AS ACCOUNTANT, EXECUTRIX, AND ATTORNEY

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

PETITION FOR WRIT OF CERTIORARI

Cheryl A. Furey, Esq.
1430 Land Title Building
100 South Broad Street
Philadelphia, PA 19110
(215) 563-7355

Attorney for Petitioner

Wright Appellate Services 0317
(215) 733-9870 ● (800) 507-9020 ● Fax (215) 733-9872

44 pp

QUESTIONS PRESENTED FOR REVIEW

Was there a violation of constitutional due process, tainting and rendering void the entire proceedings, as a result of written *ex parte* communications to the adjudicating judge, by the adversary party, and an interested person related to the adversary party, between the time of the trial, and the date of the adjudication, which *ex parte* communications were removed from the court file and the record by the trial court?

LIST OF PARTIES TO THE PROCEEDING

The petitioner is Cheryl A. Furey, Esquire, as accountant, executrix, and attorney, in the state court action below. The respondent is Anne Arlene Snipas, as residuary beneficiary in the state court action below.

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The Adjudication of the Montgomery County Court of Common Pleas, dated December 28, 2000, as originally rendered, and as typographically revised, respectively, are reproduced at page 28a Appendix G, and at page 15a Appendix F.

The unpublished Memorandum Opinion of the Superior Court of Pennsylvania, dated January 30, 2002, is reproduced at page 3a Appendix C.

STATEMENT OF JURISDICTION

The judgment sought to be reviewed was filed by the Supreme Court of Pennsylvania on December 30, 2002, in response to Petition for Allowance of Appeal filed by the petitioner from an Order of the Superior Court of Pennsylvania.

This court has jurisdiction over this matter pursuant to 28 U.S.C. § 1257 (a) which permits review by Writ of Certiorari of a final judgment rendered by the highest court of a state in which a decision could be had "where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States."

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

I. The Constitution of the United States, Amendment V [Nor] shall any person . . . be deprived of life, liberty, or property, without due process of law; . . . .

II. The Constitution of the United States, Amendment XIV [Nor] shall any State deprive any person of life, liberty, or property, without due process of law; . . . .

III. Pennsylvania Code of Judicial Conduct, Canon 3 (A) (4) A judge should accord to every person who is legally interested in a proceeding, or his lawyer, full right to be heard *according to law, and*, except as authorized by law, *must not consider ex parte communications concerning a pending proceeding*.(Emphasis added).

IV. Pennsylvania Probate, Estates and Fiduciaries Code § 3543 Interest or income on distributive shares
(a) Pecuniary legacy. –A pecuniary legacy bequeathed in trust shall bear interest at the rate of 5% per annum from the death of the decedent until payment of the legacy, and when not in trust shall bear interest at the rate of 5% per annum from one year after the death of the decedent until the payment of the legacy.

V. Pennsylvania Probate, Estates and Fiduciaries Code § 3544 Liability of a personal representative for interest. A personal representative who has committed a breach of duty with respect to estate assets shall, in the discretion of the court, be liable for interest, not exceeding the legal rate on such assets.

STATEMENT OF THE CASE

Petitioner, Cheryl A. Furey, Esquire, as accountant, executrix, and attorney for the Estate of Lillian E. Wohlpart, a/k/a Lillian Wohlpart, Deceased, respectfully seeks grant of this Petition for a Writ of Certiorari from a final judgment entered by the Supreme Court of Pennsylvania on December 30, 2002, denying the petitioner's Petition for Allowance of Appeal.

This Petition arises from a trial without jury held on July 12, 2000, in the Court of Common Pleas of Montgomery County, regarding the objections of the residuary beneficiary of the estate to counsel fees and administration commissions. Herein, Lillian E. Wohlpart, a/k/a Lillian Wohlpart (Decedent) died on March 31, 1998, leaving a Will dated November 8, 1991, naming the Petitioner, "Cheryl A. Furey, Esquire", as executrix. In her will, the Decedent left a specific bequest of $5,000.00 to Gloria Dei Lutheran Church, and, as of her date of death, due to the predecease of a named primary residuary beneficiary, the rest, residue, and remainder of Decedent's estate was bequeathed to Anne Arlene Snipas. The assets of the estate totaled $296,329.53, composed of $138,021.78 in probate assets, and $158,307.75 in non-probate assets, which combined with income receipts

of $4,611.12, for the accounting period of June 10, 1998 to March 28, 2000, then totaled $300,940.65. As to those non-probate assets where the contractually named beneficiary was said Anne Arlene Snipas, she directly transferred these assets to herself, such as that of August 1998, in combined probate and non-probate assets, she had received a total of $211,037.26 from the estate.

However, what brought this matter before the Court begins with a letter dated September 13, 1999, from Robert L. Adshead, Esquire, of Hughes, Kalkbrenner & Adshead, LLP, announcing retention by said residuary beneficiary, who questioned the amount of compensation claimed by the Petitioner as personal representative and counsel to the estate in reference to "the value of the probate assets of the estate." Said fees and commissions were calculated on a specified graduated percentage basis separately assessed against the probate and non-probate principal assets of the estate, exclusive of income, in conformance with relevant case law precedent in Pennsylvania, and said fees and commissions were accepted, as filed by the Petitioner, on the Inheritance Tax Return, by the Commonwealth of Pennsylvania, Department of Revenue, in conformance with its Notice of Inheritance Tax Appraisement, Allowance or Disallowance of Deductions and Assessment of Tax, dated October 11, 1999, and the Inheritance Tax Statement of Account, dated October 18, 1999.

Subsequent to an exchange of letters by and between the Petitioner, and counsel for the residuary beneficiary ending on January 3, 2000, a petition for Citation to Compel Filing Executor's Account was filed on January 18, 2000, which

was answered by the Petitioner, and, in accordance with the Order of the trial court, the First and Final Account of the estate was filed by the Petitioner on March 29, 2000, to which the residuary beneficiary formally objected to the Petitioner's counsel fees and administration commissions in the respective amounts of $8,839.06 as counsel fees, and $8,089.06 as administration commissions, regarding which a trial without jury was held on July 12, 2000, before Judge Calvin S. Drayer, Jr., at which only the Petitioner testified, on direct, and cross-examination as conducted by counsel for the residuary beneficiary, who sat with her attorney at counsel's table. Documents were admitted into evidence at the trial by both sides, and the record was closed to await adjudication by the court.

Thereafter, in a letter dated December 19, 2000, addressed to Judge Drayer by counsel for the residuary beneficiary, copy to the Petitioner, said counsel stated that to date, no adjudication had been received, continuing with: "Today my client called me and instructed me to withdraw the Objections so that the Account can be confirmed and final distribution made." However, on December 28, 2000, notwithstanding the aforesaid, an adjudication was entered in direct contravention to the aforesaid letter, prompting a letter addressed by the Petitioner to Judge Drayer, dated December 29, 2000. A response was issued by Judge Drayer to the Petitioner by letter dated January 3, 2001, with yet another adjudication under the same date of December 28, 2000, corrected for typographical errors.

The tenor of the adjudication substantively castigated the Petitioner in the administration of the estate, the merits of

which were unfounded and excepted to in every detail by the Petitioner in timely Exceptions filed by the Petitioner to said adjudication. However, one Exception, in effect, subsidiarily encompassed all else by excepting to apparent *ex parte* communication with the Court for the reason that it was unwarrantedly stated in the adjudication, without any basis in the record: "It has been brought to this Court's attention that the residuary beneficiary is in need of funds." (Appendix F, 25a; Appendix G, 36a). The aforesaid adjudication, dated December 28, 2000, thereupon reduced the counsel's fee from $8,839.06, to $1,500.00, and the administration commission from $8,089.06, to $6,583.07, and, additionally, personally surcharged the Petitioner for interest at a rate of 5% beginning one year after the Decedent's death on the pecuniary legacy of $5,000.00, notwithstanding the fact that during the administration of the estate, said funds were continuously invested at an interest rate of no less than 5%, and had thus earned the same, and should have been paid by the estate with that asset. Hence, the trial court, by reducing the counsel fees and administration commissions of the Petitioner, and by adding interest to be paid directly by the Petitioner, instead of by the estate asset earning the same, substantially increased the estate assets payable to the residuary beneficiary by the total sum of $9,345.05, which amount included the aforesaid interest computed at $500.00.

Petitioner's exceptions to the adjudication, following oral argument before the Court en banc, consisting of Judges Drayer, and Stanley R. Ott, were dismissed by Order of the Court entered on March 20, 2001 (Appendix E), from which Order, on April 19, 2001, Petitioner timely filed a Notice of Appeal to the Superior Court of Pennsylvania. On that same

date, after the Notice of Appeal was filed, Petitioner conducted a review of the trial court file, at the clerk's office for the Montgomery County Court of Common Pleas, Orphans' Court Division, resulting in the discovery of two *ex parte* letters addressed to Judge Drayer, dated November 6 and 28, 2000, respectively, the first of which was from the said residuary beneficiary, Anne Arlene Snipas, cc.: Ethics Board Association, and the second of which was from Mrs. John Snipas, of 531 Moreboro Road, Hatboro, Pennsylvania 19040-3933, telephone number 215-672-1320, a relative of the residuary beneficiary, as notarized by Suzanne M. Rush, Notary Public, at least one sentence of which letters was directly copied into the adjudication, referencing that "the residuary beneficiary is in need of funds." The letters speak for themselves, however, both letters constituted direct pleas to Judge Drayer in the decision making process, alleging objectionable circumstances, while impugning the Petitioner.

As there had been neither disclosure to, nor receipt by the Petitioner of these letters, the Petitioner requested the court clerk to make copies of the letters for the Petitioner, which request was denied pending determination by Judge Drayer, to whom the letters were addressed, who, it was stated, was absent from the Court on that date. Possession of both letters was retained by the court clerk, and on April 20, 2001, the Petitioner was informed by telephone by said court clerk that the Petitioner's request for photocopies of said letters was denied by Judge Drayer for the reason that the said letters were personal to the said Judge, and not part of the court file.

Thereafter, the court file that was transmitted by the trial court to the Superior Court of Pennsylvania, as the trial court

record, did not contain the aforesaid *ex parte* letters, which, in fact, were the very proof of the occurrence and content of the *ex parte* communications by the residuary beneficiary, and her relative, as the interested party, and an interested person, respectively, to the adjudicating judge, on November 6 and 28, 2000, immediately preceding the adjudication of December 28, 2000, from which adjudication this appeal arose. Consequently, the Petitioner filed with the Pennsylvania Superior Court an application for relief requesting the said appellate court to compel the trial court to supplement the record with, among other documents, the said *ex parte* letters; however, said application was denied by said appellate court by its Order entered August 28, 2001. (Appendix D). As a result of said Order, the Petitioner was constrained to proceed before the appellate court with a record devoid of the *ex parte* communications, except for the Affidavit of the Petitioner, in the place in the record where the letters, in their entirety, should have been. The Brief for Petitioner raised the *ex parte* communications issue, as it related to all of the issues on appeal, asserting that it constituted a direct violation of rules of evidence, ethics, and due process, constituting a clear abuse of discretion by the trial court. However, in affirming the trial court's decision, the Superior Court of Pennsylvania in its Memorandum Opinion dated January 30, 2002, incorrectly characterized the *ex parte* communication issue as harmless error, without prejudice to the Petitioner. (Appendix C, 12a).

Petitioner then applied to the Superior Court of Pennsylvania for reargument en banc, which application was denied by Order dated April 9, 2002. (Appendix B). Petitioner next petitioned the Supreme Court of Pennsylvania

for Allowance of Appeal, which Petition again raised the *ex parte* communications issue, as it related to all of the issues on appeal, asserting in the last lines: "Very simply, the *ex parte* communications herein concerning the pending proceeding, and the removal of those communications by the lower court from the lower court file and record of this case is a violation of federal and state constitutional due process which cannot be ignored, demanding the exercise of the power of supervision of the Supreme Court. Wherefore, this Court should grant this petition for allowance of appeal." The Supreme Court of Pennsylvania denied said Petition by Order dated December 30, 2002 (Appendix A), and it is from that Order that the Petitioner files the instant Petition for a Writ of Certiorari.

ARGUMENT

The Constitution of the United States in the Fifth and Fourteenth Amendments guaranties that no person shall be deprived of life, liberty, or property, without due process of law. Furthermore, the Pennsylvania Code of Judicial Conduct, Canon 3 (A) (4) mandates: "A judge should accord to every person who is legally interested in a proceeding, or his lawyer, full right to be heard *according to law, and,* except as authorized by law, *must not consider ex parte communications concerning a pending proceeding.*" (Emphasis added).

In this estate case, arising from the trial without jury, held on July 12, 2000, regarding the objections of the residuary beneficiary to counsel fees and administration commissions, the interested party to the proceedings, the residuary beneficiary, and a relative of said beneficiary, as an

interested person, respectively, directly communicated, *ex parte*, in writing, by letters addressed to the adjudicating judge, on November 6 and 28, 2000, concerning this pending proceeding. The adjudication which was issued on December 28, 2000, bore a statement by the adjudicating judge in its text: "It has been brought to this Court's attention that the residuary beneficiary is in need of funds." The aforesaid letters which were privately, secretly, and covertly sent to the adjudicating judge were never disclosed to nor received by the Petitioner, and when discovered by the Petitioner in a review of the court file at the trial court clerk's office after appeal had been filed by the Petitioner with the Superior Court of Pennsylvania, said letters were removed from the court file by the trial court, despite demand by the Petitioner for copies thereof. Said letters would speak for themselves, but they constituted direct pleas to the adjudicating judge for the relief sought, while impugning the Petitioner, as the accountant, executrix, and attorney for the estate. Said letters were not transmitted to the appellate court with the record from the trial court, whereupon the Petitioner applied to the appellate court to compel the trial court to supplement the record with said letters. The appellate court denied the relief requested, and in a Memorandum Opinion dated January 30, 2002, affirmed the trial court's adjudication which deprived the Petitioner of combined counsel fees, administration commissions, and interest from the estate totaling $9,345.05, which funds would be added to the funds to be received by the residuary beneficiary from the estate. Petitioner's application for reargument en banc to the Superior Court of Pennsylvania,

and subsequent petition for allowance of appeal to the Supreme Court of Pennsylvania were denied.

At every stage of this proceeding, from the initial exceptions filed with the trial court regarding all of the errors of the trial court, including the apparent *ex parte* communications, and through the Pennsylvania appellate courts, regarding said issue as a constitutional deprivation of due process, there has been denial, notwithstanding the vigorous prosecution thereof by the Petitioner. The taint and contamination of the record by the original *ex parte* communications of the residuary beneficiary, and her relative, as an interested party and person, respectively, to the adjudicating judge, and the subsequent removal of those *ex parte* communications from the court file by the trial court, results in an incomplete record and "fictional account of the actual decision making process", which action by the trial court, in the first instance, was arbitrary, an abuse of discretion, and erroneous as a matter of law. *See: Portland Audubon Society v. Endangered Species Committee*, 984 F.2d 1534 (1993); *Sullivan v. Department of Navy,* 720 F.2d 1266 (1983).

Therefore, it is the position of the Petitioner that the Supreme Court of Pennsylvania, in denying the petition for allowance of appeal in a case where the Superior Court of Pennsylvania wrote that the *ex parte* communications herein constituted harmless error which in no way prejudiced the Petitioner, has taken a position which is contrary to constitutional due process of law which conflicts with United States courts of appeal, and relevant decisions of the Supreme Court of the United States, regarding which

Petitioner seeks review pursuant to Supreme Court Rule 10 (b) and (c).

CONCLUSION

The undersigned respectfully requests that this court grant Certiorari in this matter for the reasons stated above.

Respectfully submitted,

Cheryl A. Furey, Esq.
1430 Land Title Building
100 South Broad Street
Philadelphia, PA 19110
(215) 563-7355
Attorney for Petitioner

APPENDIX A- ORDER DATED DECEMBER 30, 2002 FROM THE SUPREME COURT OF PENNSYLVANIA

IN THE SUPREME COURT OF PENNSYLVANIA MIDDLE DISTRICT

IN RE: ESTATE OF LILLIAN E. WOHLPART, A/K/A LILLIAN WOHLPART, DECEASED	:	NO. 345 MAL 2002
	:	Petition for Allowance of Appeal from the Order of the Superior Court
PETITION OF: CHERYL A. FUREY, ESQUIRE, AS ACCOUNTANT, EXECUTRIX, AND ATTORNEY	:	

ORDER

PER CURIAM

AND NOW, this 30th day of December, 2002, the Petition for Allowance of Appeal is **DENIED**.

APPENDIX B – ORDER DATED APRIL 9, 2002 FROM THE SUPERIOR COURT OF PENNSYLVANIA

IN RE: ESTATE OF LILLIAN E. WOHLPART, A/K/A LILLIAN WOHLPART, DECEASED	:	In The Superior Court of Pennsylvania
APPEAL OF: CHERYL A. FUREY, ESQUIRE, AS ACCOUNTANT, EXECUTRIX, AND ATTORNEY	:	No. 1121 EDA 2001

ORDER

AND NOW, this 9th day of April, 2002, IT IS HEREBY ORDERED:

> THAT the application filed February 13, 2002, requesting reargument/reconsideration of the decision dated January 30, 2002, is DENIED.

PER CURIAM

APPENDIX C- MEMORANDUM OPINION DATED JANUARY 30, 2002 FROM THE SUPERIOR COURT OF PENNSYLVANIA

IN RE: ESTATE OF LILLIAN E. WOHLPART, A/K/A LILLIAN WOHLPART, DECEASED	:	In The Superior Court of Pennsylvania
	:	No. 1121 EDA 2001
APPEAL OF: CHERYL A. FUREY, ESQUIRE, AS ACCOUNTANT, EXECUTRIX, AND ATTORNEY	:	

Appeal from the ORDER Entered March 20, 2001, in the Court of Common Pleas of MONTGOMERY County, CIVIL at No. 98-1912.

BEFORE: JOYCE, OLSZEWSKI, and MONTEMURO,* JJ.

MEMORANDUM: **FILED JAN. 30, 2002**

Cheryl Furey, Esquire, appeals from the March 20, 2001, order denying her objections to the Orphan Court's Adjudication concerning the First and Final Account of Lillian E. Wohlpart's Estate. We affirm.

---

* Retired Justice assigned to the Superior Court.

Lillian E. Wohlpart ("decedent") died testate on March 31, 1998, leaving an estate of $296,329.53 consisting of $138,021.78 in probate assets and $158,307.75 in non-probate assets. Decedent's non-probate assets were comprised of two annuities with MetLife, one life insurance policy, and a number of bank accounts at Fox Chase Federal Savings. The estate's probate assets included two stock certificates and twelve separate bank accounts at Fox Chase. The decedent's Last Will and Testament provided that a $5,000 pecuniary legacy was to go to Gloria Dei Lutheran Church and the remainder of the estate was to be distributed to Anne Arlene Snipas, appellee.

The letters testamentary were delivered to appellant, who is the executrix of decedent's estate. In administering the estate, appellant did not need to make any major investment decisions, because all of these assets were easy to value or distribute. The non-probate assets included bank accounts held for appellee in trust; as a result, appellee herself transacted their transfer from decedent. Appellant similarly transacted the transfer of the two annuities to which she was the direct beneficiary. As a result of a dispute with the insurance company, however, she needed to effect the transfer of the life insurance for appellee.

Appellant transferred ownership of the common stock in kind to appellee in August of 1998, but she did not physically distribute the stock certificates until May of 2000. The decedent's estate was not burdened with excessive obligations that would have prevented appellant from making cash distributions to appellee. At no time since decedent's death in 1998, however, has appellant made any such cash distributions or paid the pecuniary bequest to

Gloria Dei Lutheran Church. She did pay herself $16,928.12 for her fees and commissions based on a flat, fixed percentage rate.

On January 18, 2000, appellee filed a petition to compel filing an account, to which the lower court responded by requiring appellant to show cause why she should not be so compelled. Appellant filed an answer, and the court subsequently ordered her to file an account on or before March 29, 2000. On that date, appellant filed the First and Final Account, which calculated her compensation as executrix/accountant/attorney at $16,928.12. On April 11, 2000, appellee filed Objections to the Account, challenging the amount of fees and commission she claimed for her services. After an audit of the Account, the court issued its December 28, 2000, Adjudication, in which it reduced appellant's compensation and ordered her to pay five percent interest on the unpaid pecuniary legacy as a sanction for the delay in distributing it. Both appellant and appellee filed exceptions, which were dismissed by the court in its March 20, 2001, order. This appeal followed in which appellant raises the following issues:

> A. Whether the court erred in its findings regarding the amounts of principal disbursements and the combined balance of principal and income assets on hand before distributions?
>
> B. Whether the court erred in charging the accountant personally for interest regarding a pecuniary legacy?

C. Whether the court erred in the amounts of its allowance of fiduciary's commission and counsel fees?

D. Whether the court erred in permitting *ex parte* communication, and incorporating the same into its adjudication?

Appellant's Brief at 3.

Where an Orphan's Court judge hears testimony without a jury, the judge's findings are entitled to the weight of a jury verdict and should not be overturned absent an abuse of discretion or clear legal error. *In re Estate of Cochran*, 738 A.2d 1029, 1031 (Pa.Super. 1999). In reviewing the court's findings, we must determine if they are "supported by competent and adequate evidence" rather that rooted in a "capricious disbelief of competent and credible evidence." *Estate of Fulton*, 619 A.2d 280, 283 (Pa. Super. 1993).

Appellant alleges that the Adjudication filed by the court below misstates the combined balance of principal and income assets on hand before distribution. Rather than $80,813.00, she argues it should be $80,823.00, and appellee concedes this typographical error. This minor error has no bearing on the court's Adjudication and is a wholly frivolous matter for appeal.

Appellant's second contention addresses a more substantive issue, as she challenges the sanction the court imposed on her for failing to deliver the pecuniary legacy within one year of decedent's death. She maintains that she should not be required to pay the interest, because by continuously investing the estate's assets, she earned interest

in excess of the amount she was charged on the unpaid legacy. Appellant misunderstands the nature of this sanction and the reason it was imposed.

Section 3544 of the Probate and Estate Code provides that the court has discretion to hold a personal representative liable for interest on estate assets where that fiduciary breaches a duty with respect to those assets. An executrix owes a duty to administer the estate to the intended beneficiaries within a reasonable time and to protect the property until that transfer occurs. *In re Estate of Campbell*, 692 A.2d 1098, 1101 (Pa.Super. 1997). Failing to distribute the estate promptly qualifies as a breach of this duty, and the court may charge the executrix personally for interest on assets not "expeditiously distributed." *In re Estate of McCrea*, 380 A.2d 773, 776 (Pa.Super. 1977).

In discharging this duty, an executor must exercise the "same degree of judgment, skill, care, and diligence that a reasonable or prudent person would ordinarily exercise in the management of his or her own affairs." *In re Estate of Campbell,* 692 A.2d at 1101-02. Where the executor possesses greater skill or knowledge than that of a "man of ordinary prudence," he will be held to a higher standard of care. *In re Estate of Mastria,* 196 A.2d 653, 655 (Pa. 1964) (citations omitted).

In the present case, the lower court correctly determined that appellant breached her duty to administer the estate's assets expeditiously. The decedent died on March 31, 1998, and appellant had still not distributed the cash bequest to the church when Judge Drayer issued his March 30, 2001,

Order. In some cases, this three-year period of time would constitute a reasonable delay, but here it is not.

Decedent's estate was completely liquid, and there was more that enough cash to satisfy this bequest. Appellant also made no cash distributions to the residuary beneficiary, but she did pay herself nearly $17,000 in fees and commission for her work as the executrix, accountant, and attorney for the estate. A reasonable individual would not wait over three years to distribute a pecuniary legacy when the estate contained a sufficient amount of cash to pay it and neither the decedent nor the estate left substantial debts. As an attorney, appellant possessed even greater knowledge and skill, and yet she failed to exercise it in discharging her duty. Therefore, she breached her duty as executrix.

Accordingly, the lower court decided to exercise it discretion under section 3544 and to sanction appellant by requiring her to pay five-percent interest on the unpaid legacy. This section of the Probate and Estate Code provides that such sanction may not "exceed [ ] the legal rate on such assets." Section 3443(a) of the Code states that the legal rate of interest on an unpaid legacy shall equal five percent per annum. Since the court's sanction did not exceed this maximum rate, we find no reason to disturb its exercise of discretion. The fact that appellant invested all of the estate's assets and earned interest greater than the amount she was sanctioned does not erase or counterbalance her breach of duty.

Appellant next argues that the lower court erred in reducing the amount of commission and fees to which she was entitled as executrix/accountant/lawyer.

The Orphan's Court is in the best position to determine the appropriate level of compensation to be paid to an executrix, and we will not disturb its findings absent an abuse of discretion or error of law. *Estate of McClatchy,* 424 A.2d 1227, 1230 (Pa. 1981) (citation omitted). The Pennsylvania Supreme Court has long stated that, "[the lower court's] opportunities of judging the exact amount of labor, skill and responsibility involved, as well as its knowledge of the rate of professional compensation usual at the time and place, are necessarily greater than ours." *Id.*

When an attorney seeks compensation from an estate, she bears the burden of demonstrating that the fees are "reasonable and just," and the trial court has discretion to reduce that amount. *In re Estate of Preston,* 560 A.2d 160, 164 (Pa.Super. 1989). "Egregious error is committed when a Court awards commissions and fees simply on a percentage basis without inquiry into the reasonableness of the compensation." *Id.* at 165.

In determining whether the fees sought by an attorney are reasonable, our Supreme Court stated that the following factors are to be considered:

> The amount of work performed; the character of the services rendered; the difficulty of the problems involved; the importance of the litigation; the amount of money or value of the property in question; the degree of responsibility incurred; whether the fund involved was "created" by the attorney; the professional skill and standing of the attorney in his profession; the results he was able to obtain; the ability of the client to pay a

> reasonable fee for the services rendered; and, very importantly, the amount of money or the value of the property in question.

LaRocca's Estate, 246 A.2d 337, 339 (Pa. 1968). In the context of estate work, it is important to consider the complexity of the estate, as an attorney's fees will generally be greater when administering a more complex estate. *In re Estate of Sonovick,* 541 A.2d 374, 377 (Pa.Super. 1988). When part of the work performed by an attorney is ministerial, it is not reasonable to bill the estate the same hourly rate charged for legal services. *Estate of Bruner,* 691 A.2d 530, 534 (Pa.Super. 1997).

Here, appellant testified that she calculated her commission and fees as executrix based on a flat, fixed percentage in accordance with *Johnson Estate*, 4 Fiduc. Rep. 2d 6 (O.C. Chest. 1983). She offered no evidence to establish that this level of compensation was "reasonable and just."

The lower court, on the other hand, thoroughly considered the factors set forth by the Supreme Court and examined the work appellant performed in administering decedent's estate. The estate in this case was not complex; and due to its liquidity, appellant did not need to invest a great deal of time and effort to administer its assets. In fact, appellee was able to transfer most of the bank accounts and the two annuities herself. Appellant only transferred the two publicly traded stocks to appellee and assisted her in transferring the life insurance.

Appellant's time sheets did not distinguish between her role as executrix and attorney. Most of the services she rendered, however, were largely non-legal in nature, as she not only wrote but also spent time personally depositing checks. She did not have to make major investment decisions, value real estate or partnerships, and there were no complications that required her to appear in court.

In determining the appropriate level of compensation, the lower court also considered the services appellant failed to render as executrix/accountant/attorney. During the roughly three years since decedent's death, appellant made no cash distributions to the residuary beneficiary, did not distribute the pecuniary legacy to the church, and waited two years before filing the Account.

After carefully reviewing the record, we conclude that the lower court properly reduced appellant's compensation to a "reasonable and just" amount. As we mentioned above, appellant offered no evidence to support the much higher commission and fees she claimed.

Appellant's final ground for overturning the Orphan Court's Adjudication is similarly without merit. She alleges that the court erred in accepting *ex parte* communications from appellee and in incorporating them into its Adjudication. We rule to be harmless error.

For there to be reversible error, appellant must establish not only that the court erred in accepting and referring to the *ex parte* communications, but also that this error caused her harm. *See Hart v. W.H. Stewart, Inc.*, 564 A.2d 1250, 1252

(Pa. 1989). An error that does not prejudice one of the parties will constitute harmless error. *Id.*

We agree with appellant that Judge Drayer should not have referred to the *ex parte* communications from appellee in the December 28, 2000, Adjudication. Appellant concedes, though, that the content of these communications concerns irrelevant and personal information. *See* Appellant's Brief at 18. Specifically, appellee wrote that she was in need of money, and the court merely made a passing reference to this fact. Nothing from the Adjudication indicates that the court's decision to reduce appellant's fees in any way rested on this insignificant fact. As we previously discussed, there was adequate evidence to support the Adjudication, and the lower court's error in no way prejudiced appellant. Therefore, it was harmless error.

Order affirmed.

APPENDIX D – ORDER, DATED AUGUST 28, 2001 FROM THE SUPERIOR COURT OF PENNSYLVANIA

IN RE: ESTATE OF LILLIAN E. WOHLPART, etc., DECEASED	:	In The Superior Court of Pennsylvania
	:	(C.P. Montgomery County No. 98-1912)
APPEAL OF: CHERYL A. FUREY, ESQUIRE, etc.,	:	No. 1121 EDA 2001 Filed: August 28, 2001

ORDER

Appellant's application for relief to compel the trial court to supplement the record is **DENIED**.

Appellant's alternative request for an extension of time within which to file her brief is **GRANTED.** Appellant's brief shall be due on or before September 24, 2001.

Per Curiam

APPENDIX E – ORDER DATED MARCH 20, 2001 FROM THE MONTGOMERY COUNTY COURT OF COMMON PLEAS

IN THE COURT OF COMMON PLEAS OF
MONTGOMERY COUNTY, PENNSLYANIA
ORPHANS' COURT DIVISION

* * * * * *

NO. 98-1912

ESTATE OF LILLIAN E. WOHLPART, a/k/a LILLIAN WOHLPART, DECEASED

* * * * * *

ORDER

AND NOW, this 20th day of March, 2001, upon consideration of the Exceptions to Adjudication filed by Cheryl A. Furey, Esquire, accountant, the Exceptions to Adjudication filed by Arlene Snipas, beneficiary, and following oral argument before the Court en banc, it is hereby ORDERED and DECREED that said Exceptions are DISMISSED.

BY THE COURT:

Court en banc:
Ott, J.
Drayer, J.

_____ J.

_____ J.

APPENDIX F-LETTER DATED JANUARY 3, 2001 WITH REVISED ADJUDICATION DATED DECEMBER 28, 2000 FROM THE MONTGOMERY COUNTY COURT OF COMMON PLEAS

COURT OF COMMON PLEAS
MONTGOMERY COUNTY
THIRTY-EIGHTH JUDICIAL DISTRICT
NORRISTOWN, PENNSYLVANIA
19404

January 3, 2001

Faxed on 1/3/01 to:
Cheryl A. Furey, Esquire
1430 Land Title Bldg.
100 S. Broad Street
Philadelphia, PA 19110

Re: Estate of Lillian E. Wohlpart, Deceased, No. 98-1912

Dear Ms. Furey:

I am responding to your letter of December 29, 2000. First, my law clerk had responded to your telephone call and left word on your answering machine. Second, the adjudication as issued stands. While I did receive the letter from Mr. Adshead, I had by that time completed the adjudication and was about to issue it. In any event, it is the responsibility of this Court to review compensation under *Thompson Estate,* 232 A.2d 625.

I am enclosing with the original of this letter a slightly revised adjudication issued under the same date which corrects some typographical errors.

Your letter indicates that you will be preparing to file Exceptions and that clearly is your right. I would urge you, however, to make immediate distribution to the beneficiaries of this estate. If you feel there are still commissions and fees owing to you which are in dispute, you may hold these back as a reserve.

If you have any questions, please advise.

Sincerely,

Calvin S. Drayer, Jr.

CSD/ag

cc: Robert L. Adshead, Esquire

IN THE COURT OF COMMON PLEAS OF
MONTGOMERY COUNTY, PENNSYLVANIA
ORPHANS' COURT DIVISION

98-1912

* * * * * *

ESTATE OF LILLIAN E. WOHLPART a/k/a LILLIAN WOHLPART, DECEASED

Late of Abington Township

* * * * * *

The First and Final Account of Cheryl A. Furey, Esquire, of the Estate of Lillian E. Wohlpart, a/k/a Lillian Wohlpart, Deceased, was called for audit by this Court on May 1, 2000, and the Court held a hearing on Objections on July 12, 2000.

COUNSEL APPEARED AS FOLLOWS:

CHERYL A. FUREY, ESQ.
As Accountant

HUGHES, KALKBRENNER & ADSHEAD, LLP
By Robert L. Adshead, Esq.
For Beneficiary and Objector Arlene Snipas

The Account is stated from June 10, 1998 to March 28, 2000. The Accountant reports gross principal receipts of $138,021.78 excluding net loss on dispositions of property, reduced by principal disbursements of $61,677.75; income receipts of $4,611.12 reduced by income disbursements of $142.15, leaving a combined balance of principal and income assets on hand before distributions of $80,813.00.

Decedent, Lillian E. Wohlpart, a/k/a Lillian Wohlpart, died testate on March 31, 1998, leaving a will dated November 8, 1991, which was duly probated by the Register of Wills of Montgomery County on June 10, 1998. The same day as probate, the Register issued letters testamentary to the Accountant herein.

The decedent was not survived by a spouse.

No one has claimed the family exemption nor does the executrix indicate that anyone is entitled to the same.

All parties having an interest in this estate are said to be living, of age and *sui juris*.

All parties having or claiming any interest in this Estate, of whom the Accountant has notice or knowledge, are stated to have received written notice of this audit by letter dated April 10, 2000 in conformity with the Rules of Court.

At audit of this matter Arlene Snipas, the residuary beneficiary, filed Objections alleging that the fees and commissions charged by Cheryl A. Furey, who was acting as both attorney for the estate and as executrix, were unreasonable and excessive. The fees and commissions claimed by the Accountant on the probate assets totaled $13,761.98, roughly 10% of the probate estate. The fees and commission charged by the Accountant on the non-probate assets totaled $3,166.14, roughly 2% of the non-probate estate. The total overall fees and commissions were $16,928.12. Attorney Furey's position is that the fees and commissions claimed were in accordance with *Johnson*

Estate, 4 Fiduc. Rep. 2d 6 (O.C. Chest. 1983) and that, as such, were reasonable and not excessive.

Not only does this case highlight the difficulties that attorneys and Courts have in determining attorneys' fees for administering estates, it also has the additional complication of compensation for a person serving both as executor and attorney. The Courts of this Commonwealth continually struggle with the computation of attorneys' fees for estates. The problem is accentuated when the attorney is also serving as fiduciary.

Generally, a person seeking compensation from an estate for services as fiduciary and attorney has the burden of establishing facts demonstrating that he or she is entitled to such compensation. *Broadwater Estate,* (No. 2), 12 Fiduc. Rep. 2d 287 (O.C. Bucks 1992), *aff'd.,* 433 Pa. Super., 640, 638 A.2d 273, 1993, *Appeal denied, Estate of Broadwater v. Heins*, 538 Pa. 670, 649 A.2d 672 (1994). The Supreme Court in *LaRocca Estate,* 431 Pa. 542, 246 A.2d 337 (1968) set forth a number of factors to be considered in determining whether a particular fee is excessive.

> What is a fair and reasonable fee is sometimes a delicate, and at times a difficult question. The facts and factors to be taken into consideration in determining the fee or compensation payable to an attorney include: the amount of work performed; the character of the services rendered; the difficulty of the problems involved; the importance of the litigation; the amount of money or value of the property in question; the degree of responsibility incurred; whether the fund involved was "created"

> by the attorney; the professional skill and standing of the attorney in his profession; the results he was able to obtain; the ability of the client to pay a reasonable fee for the services rendered; and very importantly the amount of money or the value of the property in question.*
>
> *We are familiar with the fact that an attorney can rarely ever receive a reasonable fee when the services rendered are very numerous and the amount of money or value of the property involved is small. *La Rocca Estate, supra.*

Unfortunately, these factors tend to be subjective and are difficult to apply with any precision to a particular case.

It has been said that the size of the estate and the value of the time expended are more important than other factors set forth in *LaRocca* and the Rules of Professional Conduct. See Outline of Martin A. Heckscher, Esquire, and Margaret E.W. Sager, Esquire, "Attorneys' Fees, Fiduciaries, Commissions and Costs." Pennsylvania Bar Institute, *Litigating in Orphans' Court*, PBI No. 2000-2469.[1] While those factors may allow for a more objective measure, this Court believes that the complexity of the estate administration also needs to be considered.

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[1] This article also contains an excellent compendium of cases involving estate administration compensation issues. See also Hunter, Smith and Aker, *Pennsylvania Orphans' Court Commonplace Book*, "Attorney and Client" and "Commissions".

Efforts have been made in this Commonwealth to establish schedule of fees that would create more certainty. *See Johnson Estate, supra; Bailey Estate,* 10 Fiduc. Rep. 2d 55 (O.C. Chest. 990); Memorandum dated May 18, 1994 of The Honorable Robert K. Young, Administrative Judge, Orphans' Court Division of the Court of Common Pleas of Lehigh County. These efforts have been helpful in setting forth prima facie standards for compensation in estate administration. However, fee schedules focus on the size of an estate and ignore the other standards of *LaRocca.* As the Superior Court stated in *Preston Estate,* 385 Pa. Super. 48, 560 A.2d 160 (1989): "Egregious error is committed when a Court awards commissions and fees simply on a percentage basis without inquiry into the reasonableness of the compensation...".[2]

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[2] In a recent article, the editors of the Fiduciary Review suggested: "Would it not make more sense to adopt a schedule somewhat like *Johnson* (with or without an allowance for nonprobate assets) which the court would assume to be reasonable until the beneficiary proves otherwise? No beneficiary would be precluded from showing that in the facts of a particular estate or trust the fee calculated on the basis of the schedule was unreasonable, but the burden of proof would rest on the beneficiary who argued for less or on the attorney who claimed more." While this suggestion would be workable and make a Court's job in deciding fees more management, it does not appear to be current law.

Some courts, relying on *Preston*, have entirely rejected the use of fee schedules and have suggested that the only measure for value of attorneys' fees is the number of hours spent. See *Abdoe Estate,* 20 Fiduc. Rep. 159 (O.C. Lawr. 2000); *See also Rice Estate,* 10 Fiduc. Rep. 59 (O.C. Bucks 1990) and *Broadwater Estate, supra*. On the other hand, the Superior Court, in affirming Judge Stefan of this Court in *Burch Estate,* 402 Pa. Super. 314, 586 A.2d 986 (1991), opined:

> The determination of reasonable compensation to an attorney for an estate is not relegated to a clock and computer. Time expended does not replace the test of reasonableness, and while time involved is a factor in setting a fair and reasonable free, it is only one of several factors set forth in *LaRocca Estate*. . . . As noted in *Bailey Estate* . . . in determining counsel fee in an estate, the court must ". . . focus ultimately on what is fair and reasonable under the circumstances."

This Court agrees that using hours as the sole measure is not a good solution to fixing compensation. Such a system penalizes the efficient attorney. In today's world, firms specializing in estate administration have expedited their work through the use of paralegals and computer programs. Computer systems save substantial time from the manual process that was used for many years. A paralegal's rate will be less than an attorney's rate. Thus, if an hourly system was used for billing estates, the efficient firms would be billing less hours at lower rates. This should be compared to attorneys who have not adopted these systems. Their bills

using an hourly rate system would be higher for less efficient work.[3]

All of these attempts at standardizing compensation ignore a basic fact – all estates are different. As courts are fond of saying. "No will has a brother." *Williamson Estate,* 302 Pa. 462, 153 A.2d 765 (1931). This is equally true for estates. Each estate has different beneficiaries and different types of assets; some may have valuation problems; some may have tax problems and opportunities of infinite variety that require significant post mortem planning. Small estates with strange depository schemes, unusual assets or liquidity problems can be more difficult to manage than large, well-planned, liquid estates. Therefore, some of the other *LaRocca* factors such as "the character of the services rendered", "the difficulty of the problems involved" and "the degree of responsibility incurred" become extremely important in determining the compensation of the attorney.

There is a line of cases that hold that "a sole fiduciary who is also an attorney may not receive commissions as fiduciary and also an attorney's fee for ordinary legal services rendered . . . He may receive attorney's fees for extraordinary legal services in addition to commissions as fiduciary." *Himes Estate,* 16 Chester, 27 (O.C. 1967); *See*

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[3] Attorneys who have small estate practices may complain that they cannot afford a paralegal or a computer system. This is not true. There exist very inexpensive accounting programs using a Quicken platform. There are part-time paralegals who can be hired on an estate-by-estate basis.

also Perry Estate, 27 Chester. 37 (O.C. 1979); *Eckel's Estate,* 37 D. & C. 383 (O.C. Montg. 1940); and *Michener Estate,* 6 Fiduc. Rep.2d 345 (O.C. Chest., 1986). More recent cases seemed to have relaxed this somewhat rigid approach and have attempted to determine more subjectively what is reasonable under the circumstances. *See Estate of Sonovick,* 373 Pa. Super. 396, 541 A.2d 374 (1988). This approach is more in line with *LaRocca.*

LaRocca, by referring to "fee or compensation payable to an attorney" seems to be directly addressing the case of a fiduciary-attorney. In order for a court to properly analyze the services of a fiduciary-attorney and to avoid duplication of fees, the attorney must keep separate records for his service in each capacity. *Taylor Estate,* 3 Fiduc. Rep. 410 (O.C. Montgo, 1983).

A review of the account and the time records of the Accountant reveals that this was a very basic estate with no complications. The bulk of the estate at the decedent's death was in a number of bank accounts and certificates of deposit at one bank and two publicly traded stocks. The Accountant made no changes in the bank accounts and certificates of deposit, and she distributed the stocks to the beneficiary in kind. The debts of decedent totaled $61.07. There were less than 10 checks written for administrative expenses. The time records also failed to distinguish between services rendered as executor and those rendered as attorney.

It is clear that this estate had none of the problems that most estates have. It had only two beneficiaries; it had no assets that were difficult to value or distribute such as real estate, close corporations or partnerships; there were no

major investment decisions; a federal estate tax return was not required; and no post mortem planning was done by the Accountant.

The Accountant has also failed to take some of the basic steps in administering this estate. The decedent died on March 31, 1998. The only distribution made by the Accountant was of the two stocks to the residuary beneficiary. The pecuniary bequest to Gloria Dei Lutheran Church has not been paid. Under §3543 of the Probate and Estates Code, this bequest is entitled to interest at a rate of 5% beginning one year after decedent's death. Any interest payable on this bequest is to be paid by the Accountant.

There have been no cash distributions to the residuary beneficiary. On the other hand, the Accountant made substantial payments to herself on account of her fees and commissions. It has been brought to this Court's attention that the residuary beneficiary is in need of funds. There is nothing to indicate there were obligations of the decedent or the estate that would have prevented the Accountant from making interim distributions to the residuary beneficiary. It also appears that the Accountant made no effort to gain an income tax benefit for the residuary beneficiary by the proper timing of the payment of her fees and commissions. Lastly, the Court notes that the residuary beneficiary was required to cite the Accountant to file her account, and the account was not filed until almost two years after the decedent died. Such a delay in a simple estate is not acceptable.

The Court is of the opinion that the compensation of the Accountant must be reduced. A review of the time sheets indicate that a majority of the time spent on this matter was administrative in nature and could have been performed by an administrative assistant at substantially less cost. Also much of the time reported, such as 9.7 hours for depositing checks, seems to be excessive. The Court also notes that the Accountant is claiming compensation of 2% of nonprobate assets, or $3,166.14, which is disallowed under *Preston.* The Court is of the opinion that the counsel fee charged by the Accountant should be reduced from $7,255.99 to $1,500. Accordingly, the total compensation of the Accountant is to be an Executor's commission of $6,583.07 and an attorney's fee of $1,500.

No other questions are before this Court requiring adjudication.

The Accountant is credited for an additional principal disbursement for a filing fee of $210.00.

The Accountant is debited for additional receipts of income since the filing of the Account totaling $625.43.

Subject to the views expressed herein and the adjustments required thereby, subject to distributions heretofore properly made, and subject to any Pennsylvania inheritance transfer tax that may properly be due, the net ascertained balances of principal and income are awarded as provided in the Petition for Adjudication.

Power and authority are given the Accountant to make the necessary transfers and assignments of the uncontroverted investment securities herein awarded in kind.

The First and Final Accountant is confirmed, and it is hereby ORDERED and DECREED that Cheryl A. Furey, Esquire, Executrix, forthwith pay the distributions herein awarded.

AND NOW, this 28th day of December, 2000, this Adjudication is confirmed NISI.

BY THE COURT:

_____

J.

APPENDIX G- ADJUDICATION DATED DECEMBER 28, 2000 FROM THE MONTGOMERY COUNTY COURT OF COMMON PLEAS

IN THE COURT OF COMMON PLEAS OF
MONTGOMERY COUNTY, PENNSYLVANIA
ORPHANS' COURT DIVISION

98-1912

* * * * * *

ESTATE OF LILLIAN E. WOHLPART a/k/a LILLIAN WOHLPART, DECEASED
Late of Abington Township

* * * * * *

The First and Final Account of Cheryl A. Furey, Esquire, of the Estate of Lillian E. Wohlpart, a/k/a Lillian Wohlpart, Deceased, was called for audit by this Court on May 1, 2000, and the Court held a hearing on Objections on July 12, 2000.

COUNSEL APPEARED AS FOLLOWS:

CHERYL A. FUREY, ESQ.
As Accountant

HUGHES, KALKBRENNER & ADSHEAD, LLP
By Robert L. Adshead, Esq.
For Beneficiary and Objector Arlene Snipas

The Account is stated from June 10, 1998 to March 28, 2000. The Accountant reports gross principal receipts of $138,021.78 excluding net loss on dispositions of property, reduced by principal disbursements of $61,677.75; income

receipts of $4,611.12 reduced by income disbursements of $142.15, leaving a combined balance of principal and income assets on hand before distributions of $80,813.00.

Decedent, Lillian E. Wohlpart, a/k/a Lillian Wohlpart, died testate on March 31, 1998, leaving a will dated November 8, 1991, which was duly probated by the Register of Wills of Montgomery County on June 10, 1998. The same day as probate, the Register issued letters testamentary to the Accountant herein.

The decedent was not survived by a spouse.

No one has claimed the family exemption nor does the executrix indicate that anyone is entitled to the same.

All parties having an interest in this estate are said to be living, of age and *sui juris*.

All parties having or claiming any interest in this Estate, of whom the Accountant has notice or knowledge, are stated to have received written notice of this audit by letter dated April 10, 2000 in conformity with the Rules of Court.

At audit of this matter Arlene Snipas, the residuary beneficiary, filed Objections alleging that the fees and commissions charged by Cheryl A. Furey, who was acting as both attorney for the estate and as executrix, were unreasonable and excessive. The fees and commissions claimed by the Accountant on the probate assets totaled $13,761.98, roughly 10% of the probate estate. The fees and commission charged by the Accountant on the non-probate assets totaled $3,166.14, roughly 2% of the non-probate estate. The total overall fees and commissions were

$16,928.12. Attorney Furey's position is that the fees and commissions claimed were in accordance with *Johnson Estate,* 4 Fiduc. Rep. 2d 6 (O.C. Chest. 1983) and that, as such, were reasonable and not excessive.

Not only does this case highlight the difficulties that attorneys and Courts have in determining attorneys' fees for administering estates, it also has the additional complication of compensation for a person serving both as executor and attorney. The Courts of this Commonwealth continually struggle with the computation of attorneys' fees for estates. The problem is accentuated when the attorney is also serving as fiduciary.

Generally, persons seeking compensation from an estate for services as fiduciary and attorney have the burden of establishing facts demonstrating that he or she is entitled to such compensation. *Broadwater Estate,* (No. 2), 12 Fiduc. Rep. 2d, 287 (O.C. Bucks 1992), Aff'd., 433 Pa. Super., 640, 638 A.2d 273, 1993, Appeal denied, *Estate of Broadwater* v. *Heins*, 538 Pa. 670, 649 A.2d 672 (1994). The Supreme Court in *LaRocca Estate,* 431 Pa. 542, 246 A.2d 337 (1968) set forth a number of factors to be considered in determining whether a particular fee is excessive.

> What is a fair and reasonable fee is sometimes a delicate, and at times a difficult question. The facts and factors to be taken into consideration in determining the fee or compensation payable to an attorney include: the amount of work performed; the character of the services rendered; the difficulty of the problems involved; the importance of the litigation; the amount of money or value of the

> property in question; the degree of responsibility incurred; whether the fund involved was "created" by the attorney; the professional skill and standing of the attorney in his profession; the results he was able to obtain; the ability of the client to pay a reasonable fee for the services rendered; and very importantly the amount of money or the value of the property in question.*
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> *We are familiar with the fact that an attorney can rarely ever receive a reasonable fee when the services rendered are very numerous and the amount of money or value of the property involved is small. *La Rocca Estate, supra.*

Unfortunately, these factors tend to be subjective and are difficult to apply with any precision to a particular case.

It has been said that the size of the estate and the value of the time expended are more important than other factors set forth in *LaRocca* and the Rules of Professional Conduct. See Outline of Martin A. Heckscher, Esquire, and Margaret E.W. Sager, Esquire, "Attorneys' Fees, Fiduciaries, Commissions and Costs." Pennsylvania Bar Institute, *Litigating in Orphans' Court*, PBI No. 2000-2469.[1] While those factors may allow for a more objective measure, this Court believes

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[1] This article also contains an excellent compendium of cases involving estate administration compensation issues. See also Hunter, Smith and Aker, *Pennsylvania Orphans' Court Commonplace Book*, "Attorney and Client" and "Commissions".

that the complexity of the estate administration also needs to be considered.

Efforts have been made in this Commonwealth to establish schedule of fees that would create more certainty. *See Johnson Estate, supra; Bailey Estate,* 10 Fiduc. Rep. 2d 55 (O.C. Chest. 990); Memorandum dated May 18, 1994 of The Honorable Robert K. Young, Administrative Judge, Orphans' Court Division of the Court of Common Pleas of Lehigh County. These efforts have been helpful in setting forth prima facie standards for compensation in estate administration. However, fee schedules focus on the size of an estate and ignore the other standards of *LaRocca.* As the Superior Court stated in *Preston Estate,* 385 Pa. Super. 48, 560 A.2d, 160 (1989): "Egregious error is committed when a Court awards commissions and fees simply on a percentage basis without inquiry into the reasonableness of the compensation...".[2]

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Some courts, relying on *Preston*, have entirely rejected the use of fee schedules and have suggested that the only measure for value of attorneys' fees is the number of hours spent. See *Abdoe Estate,* 20 Fiduc. Rep. 159 (O.C. Lawr. 2000). See also *Rice Estate,* 10 Fiduc. Rep 59 (O.C. Bucks 1990) and *Broadwater Estate, supra*. On the other hand, the Superior Court in affirming Judge Stefan of this Court in *Burch Estate,* 402 Pa. Super. 314, 586 A.2d 986 (1991) opined:

> The determination of reasonable compensation to an attorney for an estate is not relegated to a clock and computer. Time expended does not replace the test of reasonableness, and while time involved is a factor in setting a fair and reasonable free, it is only one of several factors set forth in *LaRocca Estate*. . . . As noted in *Bailey Estate* . . . in determining counsel fee in an estate, the court must ". . . focus ultimately on what is fair and reasonable under the circumstances."

This Court agrees that using hours as the sole measure is not a good solution to fixing compensation. Such a system penalizes the efficient attorney. In today's world, firms specializing in estate administration have expedited their work through the use of paralegals and computer programs. Computer systems save substantial time from the manual process that was used for many years. A paralegal's rate will be less than an attorney's rate. Thus, if an hourly system was used for billing estates, the efficient firms would be billing less hours at lower rates. This should be compared to attorneys who have not adopted these systems. Their bills

using an hourly rate system would be higher for less efficient work.[3]

All of these attempts at standardizing compensation ignore a basic fact – all estates are different. As courts are fond of saying, "No will has a bother." *Williamson Estate,* 302 Pa. 462, 153 A.2d 765 (1931). This is equally true for estates. Each estate has different beneficiaries and different types of assets; some may have valuation problems; some may have tax problems and opportunities of infinite variety that require significant post mortem planning. Small estates with strange depository schemes, unusual assets or liquidity problems can be more difficult to manage than large, well-planned, liquid estates. Therefore, some of the other *LaRocca* factors such as "the character of the services rendered", the difficulty of the problems involved" and "the degree of responsibly incurred" become extremely important in determining the compensation of the attorney.

There is a line of cases that hold that "a sole fiduciary who is also an attorney may not receive commissions as fiduciary and also an attorney's fee for ordinary legal services rendered. . . . He may receive attorney's fees for extraordinary legal services in addition to commissions as fiduciary." *Himes Estate,* 16 Chester. 27 (O.C. 1967); See

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[3] Attorneys who have small estate practices may complain that they cannot afford a paralegal or a computer system. This is not true. There exist very inexpensive accounting programs using a Quicken platform. There are part-time paralegals who can be hired on an estate by estate basis.

also *Perry Estate,* 27 Chester. 37 (O.C. 1979); *Eckel's Estate,* 37 D. & C. 383 (O.C. Montg. 1940); and *Michener Estate,* 6 Fiduc. Rep.2d 345 (O.C. Chest., 1986). More recent cases seemed to have relaxed this somewhat rigid approach and have attempted to determine more subjectively what is reasonable under the circumstances. See *Estate of Sonovick,* 373 Pa. Super. 396, 541 A.2d 374 (1988). This approach is more in line with *LaRocca.*

LaRocca, by referring to "fee or compensation payable to an attorney" seems to be directly addressing the case of a fiduciary-attorney. In order for a court to properly analyze the services of a fiduciary-attorney and to avoid duplication of fees, the attorney must keep separate records for his service in each capacity. *Taylor Estate,* 3 Fiduc. Rep. 410 (O.C. Montco, 1983).

A review of the account and the time records of the Accountant reveals that this was a very basic estate with no complications. The bulk of the estate at the decedent's death was in a number of bank accounts and certificates of deposit at one bank and 2 publicly traded stocks. The Accountant made no changes in the bank accounts and certificates of deposit, and she distributed the stocks to the beneficiary in kind. The debts of decedent totaled $61.07. There were less than 10 checks written for administrative expenses. The time records also failed to distinguish between services rendered as executor and those rendered as attorney.

It is clear that this estate had none of the problems that most estates have. It had only two beneficiaries; it had no assets that were difficult to value or distribute such as real estate, close corporations or partnerships; there were no

major investment decisions; a federal estate tax return was not required; and no post mortem planning was done by the Accountant.

The Accountant has also failed to take some of the basic steps in administering this estate. The decedent died on March 31, 1998. The only distribution made by the decedent was of the two stocks to the residuary beneficiary. The pecuniary bequest to Gloria Dei Lutheran Church has not been paid. Under §3543 of the Probate and Estates Code, this bequest is entitled to interest at a rate of 5% beginning one year after decedent's death. Any interest payable on this bequest is to be paid by the Accountant.

There have been no cash distributions to the residuary beneficiary. On the other hand, the Accountant made substantial payments to herself on account of her fees and commissions. It has been brought to this Court's attention that the residuary beneficiary is in need of funds. There is nothing to indicate there were obligations of the decedent or the estate that would have prevented the Accountant from making interim distributions to the residuary beneficiary. It also appears that the Accountant made no effort to gain an income tax benefit for the residuary beneficiary by the proper timing of the paying of her fees and commissions. Lastly, the Court notes that the residuary beneficiary was required to cite the Accountant to file her account, and the account was not filed until almost two years after the decedent died. Such a delay in a simple estate is not acceptable.

The Court is of the opinion that the compensation of the Accountant must be reduced. A review of the time sheets indicate that a majority of the time spent on this matter was administrative in nature and could have been performed by an administrative assistant at substantially less cost. Also much of the time reported, such as 9.7 hours for depositing checks, seems to be excessive. The Court also notes that the Accountant is claiming compensation of 2% of nonprobate assets, or $3,166.14, which is disallowed under *Preston.* The Court is of the opinion that the counsel fee charged by the Accountant should be reduced from $7,255.99 to $1,500. Accordingly, the total compensation of the Accountant is to be an Executor's commission of $6,583.07 and an attorney's fee of $1,500.

No other questions are before this Court requiring adjudication.

The Accountant is credited for an additional principal disbursement for a filing fee of $210.00.

The Accountant is debited for additional receipts of income since the filing of the Account totaling $625.43.

Subject to the views expressed herein and the adjustments required thereby, subject to distributions heretofore properly made, and subject to any Pennsylvania inheritance transfer tax that may properly be due, the net ascertained balances of principal and income are awarded as provided in the Petition for Adjudication.

Power and authority are given the Accountant to make the necessary transfers and assignments of the uncontroverted investment securities herein awarded in kind.

The First and Final Accountant is confirmed, and it is hereby ORDERED and DECREED that Cheryl A. Furey, Esquire, Executrix, forthwith pay the distributions herein awarded.

AND NOW, this 28th day of December, 2000, this Adjudication is confirmed NISI.

BY THE COURT:

_____

J.